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Testimony of
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In Opposition to
Governor's Bill 1013, Section 40

Appropriations Committee
March 4, 2011

Good evening members of the Appropriations Committee. I am Whitney M. Lewendon, a member of the Connecticut Bar Association Elder Law Section. I am testifying on behalf of the Section in opposition to a proposal in the Governor's budget bill, 1013, Section 40, concerning a dramatic and drastic change in a Medicaid eligibility rule. This proposed change could be the single most significant development to adversely affect vulnerable senior citizens and younger disabled individuals who need access to critical health care that I have seen in my more than 37 years of experience working with the Connecticut Medicaid program.

The proposal found at Section 40 of the Governor's bill to change the transfer of asset rule suffers from legal defects that are similar or nearly identical to a rule that was found illegal by Connecticut's federal district court in 1976. It is, however, in many ways even worse than the rule in the 1970s. This new proposal is a significant shift in public policy that will have consequences which will drain funds from the system of long term care services.

I will begin with the public policy issue. The proposal before you in Section 40, paragraph (d) prohibits the reduction of a penalty resulting from a transfer of asset even though there is a partial return of the gifted funds. The new proposal provides that there will be no reduction

If that same widowed mother now is in need of long term care services and applies for Medicaid benefits, she will be denied Medicaid because of those gifts two years ago. The length of the penalty would be approximately two months.

Under our existing rules, family members can return some of the funds they received and thereby shorten the penalty period in such cases. The second child who now has two children in college is able to return the gift to his widowed mother. The first child, however, has spent the funds, has continued to struggle to meet basic expenses and is not able to replace the funds that his widowed mother had given him.

The partial return by the second son of the college funds reduces the length of the penalty period from two months to one month under our existing rule. This makes sense because the actual net gift is only the $10,000 that was not returned, not the $20,000 given away initially.

The change in this proposed system to a "full return" rule eliminates any incentive this family has to replace the funds that they had received from their widowed mother. If, for instance, only the second son who received college funds can return those college funds, then the full return rule means that the penalty is not shortened by the amount of the returned funds.

None of our neighboring states have adopted the "full return" rule which Connecticut is proposing. Indeed, at best, it appears that only a handful of states nationwide followed the "full return" rule.

Let me emphasize that federal law allows States to employ a partial return rule, so that the length of a penalty is reduced by the amount of the gifts returned, even when the returns are only partial. Why should our Connecticut seniors be treated differently than their counterparts in any of our neighboring states, or in fact in most of the states of this country? The full return rule is simply a bad idea.

But it's not just a bad idea. Other parts of this proposal are also contrary to federal law. As given away are treated. In 1976, the United States District Court for Connecticut ruled that a similar assumption, that an individual had assets even though they were not in that person's actual possession, was contrary to federal law and in violation of the Supremacy clause. It struck down the Connecticut statute which was based upon that attribution of assets. *Buckner vs. Maher*, 424 F. Supp. 366 (D.Conn., 1976). I was one of the plaintiff's attorneys in that case.

Now DSS has a direct statement issued by CMS that an additional federal authority, the State Medicaid Manual, does not require the treatment of assets that DSS is proposing. DSS has been told that the proposal to treat assets as available during the entire time from the original gift to the return has no foundation in federal law.

Another proposal which finds no basis in federal law is the proposed requirement that a penalty will be eliminated only in the event that every person who received a gift returns the gift, regardless of whether the full amount of the gift has been returned, paragraph (d)(1). There is absolutely nothing in federal law which supports this rule. Moreover, it makes no practical sense. If one member of the family is able to return the entire amount of a gift from a parent, even though that member did not receive all of the gift, should the parent be penalized because the return is only from one of several people who received the gift? The only valid test is to determine how much has been returned, not who returned it.

Finally, DSS suggests that anytime a gift has been made by someone who applies for Medicaid, the gift shall be treated as a trust because some assets are returned. Paragraph (d) (3). There is no exception to this rule. Under the proposal, a gift is irrebuttably presumed to have been made to a "trust-like" arrangement.

Irrebuttable presumptions have no place and are not tolerated in the determination of eligibility for benefits created by federal law. DSS, further, has been put on notice by that it must avoid this approach. CMS told DSS that any adverse action which DSS proposes to take must be